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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

I.T.A.No. 151 of 2007

Date of decision: May 3, 2007

Commissioner of Income-Tax, Faridabad

...Petitioner

Versus

M/s Steriplate (P) Ltd., Plot No.16, Sector 24, Faridabad.

...Respondent

CORAM: HON'BLE MR.JUSTICE M.M.KUMAR
HON'BLE MR.JUSTICE RAJESH BINDAL

Present: Mr.Yogesh Putney, Advocate for the revenue.

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RAJESH BINDAL, J.

The revenue has approached this Court by filing the present appeal raising the following substantial questions of law, arising out of order dated 5.7.2005 passed by the Income-Tax Appellate Tribunal, Delhi Bench 'F', New Delhi (for short, 'the Tribunal') in ITA Nos. 4250/Del/98 and 4251/Del/98, for the assessment year 1994-95:-

> "1. Whether, on the facts and circumstances of the case, the Hon'ble ITAT was not perverse in ignoring the facts that establish the use of colourable device with its sister concern, namely, M/s Gulmarg Engg. (P) Ltd., and thereby holding the latter to be entitled for a commission of 40%?
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> 2. Without prejudice to the above, whether the Hon'ble ITAT was right in ignoring the colourable device being used by the assessee to avoid the payment of due taxes"

Briefly the facts are that the assessee, who is engaged in business of manufacture of plastic moulded components besides doing electroplating of nickel and Zinc on H.S. Components, filed its return for

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the assessment year in question on November 30, 1994 declaring its income at Rs. 1,30,42,630/-. The same was processed under Section 143(1)(a) of the Income Tax Act, 1961 (for short 'the Act') on March 31, 1995 at an income of Rs. 1,30,44,280/-. Subsequently notice under Section 143(2) of the Act was issued and served on the assessee on October 15, 1995. During the course of assessment proceedings, it was found that during the year in question, the assessee had paid a sum of Rs. 17,87,223/- to M/s Gulmarg Holdings Pvt. Ltd. as commission with a view to avoid tax. The claim made by the assessee was disallowed. In appeal, the Commissioner of Income Tax (Appeals), (for short, 'the CIT(A)') accepted the plea of the assessee to the extent that commission was payable, however, rate was found to be excessive and the same was ordered to be restricted to 1.5%. In further appeal by the assessee before the Tribunal, the Tribunal accepted the plea of the assessee and held that once the CIT(A) had accepted the arrangement for payment of commission for the services rendered by M/s Gulmarg Holdings Pvt. Ltd., there was no occasion for him not to allow the commission in toto as was agreed between the parties and paid. It is further noticed that even after payment of commission, the profit of the assessee company increased to Rs.126.44 lacs as against Rs. 28.62 lacs in the preceding year. The turn over and processing charges increased from Rs. 357.44 lacs as against Rs. 205.66 lacs. Relevant observations of the Tribunal in the order passed in appeal are extracted below:-

> "The learned CIT(A) after accepting that the payment made by the assessee was for business of the assessee and that the payment made was genuine and for business consideration in our considered view was not justified in reducing the commission payment to 1.5% on the turn over exceeding the turn over of 1992-93. In our opinion the AO cannot sit over the judgment of the business-man. The business-man is entitled to the profit of the business and bears the loss suffered in the business. It is the decision of the management of the company to decide what percentage of commission it should pay to the party from whom he gets the job done. It is a

> decision based on business consideration taking into consideration business environment and the market conditions. We find in the present case the assessee had paid commission for survival of its business, which was on the verge of closure due to heavy rejection. Hence, in our considered view the CIT(A) was not justified in reducing the commission paid by the assessee. Hence, we set aside the order of CIT(A) and direct him to allow the commission payment @ 5% over and above the 40% increase on the turn over for the assessment year 1992-93."

As the Tribunal accepted the claim of the assessee but still inadvertently failed to grant the entire relief on account of non consideration of the terms of the agreement between the parties, the assessee moved an application for rectification, which was accepted vide order dated May 12, 2006 and it was directed that as per agreement between the parties, the assessee was liable to pay the commission to M/s Gulmarg Holdings Pvt. Ltd. at the rate of 5% on the entire turn over in case on account of service rendered by M/s Gulmarg Holdings Pvt. Ltd., the turn over increased by more than 40%. Result was not that higher commission was to be paid only on the turn over exceeding 40% as compared to earlier year. Accordingly, the order was rectified and it was directed that entire claim of commission paid by the assessee to M/s Gulmarg Holdings Pvt. Ltd. was allowable.

Having heard learned counsel for the revenue, whose only contention is that it was a payment of commission to sister concern to reduce the tax liability and infact was not a genuine transaction, hence, not allowable as a business expenses. However, we find that there are clear findings of fact recorded by the authorities below especially the Tribunal to the effect that the rate of commission was increased on fulfillment of certain specified condition i.e. that the turn over of the company increased by not less than 40% as compared to earlier year. It is not disputed that the efforts of the company to whom the commission was paid, the turn over had increased by more than 40%. It is also further not disputed that the income

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of the assessee company during the year had increased five times as compared to previous year. Under these circumstances, it cannot be said that payment of commission to M/s Gulmarg Holdings Pvt. Ltd. was merely a paper transaction to avoid the tax liability. While concurring with the view expressed by the Tribunal, we are unable to hold that the findings recorded by the Tribunal are, in any manner, perverse.

Accordingly, the appeal is dismissed.

(Rajesh Bindal)
Judge

May 03, 2007 **(M.M.Kumar)**
Pka **Judge**